1864

No. 454 157

Sy. of Short, Davies, Allen, Strudwick for Pet.

454

Filed Nov. 20, 1899.

Supreme Court of the United States,

OCTOBER TERM, 1899.

EX PARTE THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Petitioner.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, vs. TINE COHEN, Defendant in Error.

BRIEF OF PETITIONER

EDWARD LYMAN SHORT,
JULIEN T. DAVIES,
JOHN B. ALLEN,
FREDERIC D. McKENNEY,
ROBERT C. STRUDWICK,
Attorneys for Petitioner.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1899.

EX PARTE THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, a corporation, Petitioner.

PETITION FOR WRIT OF CERTIORARI requiring the Circuit Court of Appeals for the Ninth Circuit to certify to the Supreme Court for its review and determination the case of THE MUTUAL LIFE INSURANCE COMPANY OF NEW YORK, Plaintiff in Error, vs. TINE COHEN, Defendant in Error.

BRIEF OF PETITIONER.

STATEMENT.

The Mutual Life Insurance Company of New York, a corporation chartered by special act of the Legislature of that state, in June, 1885 insured the life of Alexander Cohen by a policy in the sum of three thousand dollars. At the time of taking the insurance Cohen was a citizen of Montana, residing at Butte. The insurance company was transacting its insurance business in the state, then territory, of Montana. The application for the insurance and the endorsements upon it, were a part of the contract. The application contained the following provision:

"This application is submitted to the said company with the following express covenants and agreements:

"1. That it will constitute no contract of insurance until a policy shall first have been issued and delivered by the said

company and the first premium thereon actually paid during the continuance of the life proposed for insurance in the same condition of health as described in the application."

(Petition, p. 4.)

Among the endorsements upon the policy is the following:

"All premiums are due and payable at the home office of the company in the city of New York, but will be accepted elsewhere, when duly made in exchange for the company's receipt, signed by the president or secretary. Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice required by any statute is thereby expressly waived."

(Petition, p. 6.)

The following notice was also printed upon the policy:

"Third. No policy holder must expect to be notified when his premium will be due. It is the practice of the company to send these notices as reminders, when the address is known, but no responsibility is assumed on the part of the company in consequence of their non-reception."

(Petition, p. 7.)

The policy provided for the payment of annual premiums, but agreeably to the regulations of the company, the payments were altered to semi-annual. The premiums were paid to the 10th of June, 1892, and on the 11th day of said month the semi-annual premium for the ensuing half year was paid, but no premium was paid after that date, all subsequent premiums remaining unpaid at the death of said Alexander Cohen, September 21st, 1897, at Rossland, British Columbia. On the 9th of November, 1898, after the death of Alexander Cohen, Tine Cohen, wife of the deceased and beneficiary in the policy, began action against The Mutual Life Insurance Company to recover

three thousand dollars, the amount of the policy, with interest, the action being in the United States Circuit Court for the District of Washington, Western Division. In her complaint she set forth the application and policy, with the endorsements thereon, as her cause of action, alleging compliance with the terms of the contract on the part of the insured during his lifetime, and on her part subsequently.

(Petition, p. 6.)

The Mutual Life Insurance Company in its answer admitted the execution and delivery of the policy, but denied that it was delivered or entered into in the state of New York, and controverted compliance with the terms of the contract on the part of the insured or the defendant in error, and asserted as a defense that the application for the policy which by its terms constituted a part of the policy, contained the following agreement:

"1. That it will constitute no contract of insurance until a policy shall first have been issued and delivered by the said company and the first premium thereon actually paid during the continuance of the life proposed for insurance in the same condition of health as described in the application."

And further alleged that the policy, which was the same in the complaint set forth, contained the following provision:

"Notice that each and every payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived."

(Petition, p. 7.)

It was further alleged that there was printed upon and constituted a part of the policy, the notice hereinbefore quoted, that "no policy holder must expect to be notified when his premium will be due;" and further alleged that said Alexander Cohen

paid the premiums on the policy up to the 10th day of June, 1892, and on the 11th day of said month made payment of the semi-annual premium for the ensuing half year beginning on that day, but thereafter wholly neglected, failed and refused to pay any other premium or any part thereof upon the policy, and that no payment whatever was made by or on behalf of the said Alexander Cohen of any annual or semi-annual premium, but the same was suffered to lapse and become forfeited; that by reason of the defaults of the insured, the policy did become forfeited, lapsed and terminated, and was so declared by the insurance company. A demurrer was interposed to this answer as a whole and to each of the defenses separately, and sustained by the Circuit Court. The plaintiff in error electing to stand upon its answer, judgment was entered against it for two thousand six hundred and seventy-one and 41-100 dollars, with interest and costs. The plaintiff in error feeling aggrieved by the judgment, appealed to the Circuit Court of Appeals for the Ninth Circuit for a writ of error, which was issued, and the cause heard before the Circuit Court of Appeals, which, on the 2nd day of October, 1899, affirmed the judgment of the Circuit Court.

Upon the foregoing brief statement of facts, which are more fully set forth in the petition, petitioner asks this court to grant a writ of certiorari.

ARGUMENT.

We present the following reasons why a writ of certiorari should be granted by this Court under Section 6 of the Act of March 3rd, 1891, (*26 Stats. at Large, 826*) requiring the record and cause to be sent up to this Court for its consideration:

THE STATUTE OF NEW YORK RELATING TO FOREIGN CORPORATIONS TRANSACTING BUSINESS IN THAT STATE IS NOT OPERATIVE BEYOND THE STATE OF NEW YORK.

By the terms of the statute it applies alike to foreign and domestic corporations. Its language is: "No life insurance corporation doing business in this state shall declare forfeited or lapsed any policy." The language employed respecting the foreign corporation measures the authority assumed as to the domestic corporation. It is a regulating statute as to business done in the state of New York and not beyond its boundaries. It is a statute outside of the contract of insurance, recognizing the contract as being complete in itself, independently of the statute. The further provision that proof of the sending or mailing of the notice may be established by the affidavit of an officer of the corporation, which shall be presumptive evidence that such notice was given, demonstrates that the statute was one designed to operate upon persons within the state of New York.

"The affidavit of any officer, clerk or agent of the corporation, or of any one authorized to mail such notice, that the notice required by this section has been duly addressed and mailed by the corporation issuing such policy, shall be presumptive evidence that such notice has been duly given."

(Petition, p. 3.)

It is not within the competency of the legislature of one state to enact rules of evidence for the use of another state or government.

Wharton, in his Conflict of Laws, says (Sec. 752, 2nd Ed.):

"There can be no question that the *lex fori* is also to determine the competency and weight of evidence adduced to prove a litigated case. * * * On the one side, every case must be governed by the law in which it has its seat. On the other side,

the court, in which such case comes to be tried, must direct its own procedure."

In 2nd Parsons on Contracts, 7th Ed., p. 718, the rule is thus stated:

"But on the trial, and in respect to all questions as to the forms, or methods, or conduct of process, or remedy, the law of the place of the forum is applied."

It is thus seen the statute is one of public policy for the state of its enactment, establishing rules of evidence to be applied so far as the law itself extends. The conceded object of this statute is to relieve the negligent and improvident policy holder from the consequences of his carelessness in failing to pay the premiums upon his policy as they fall due. Taking into consideration the date of the enactment of the statute, 1876, and the condition of the mail service throughout the United States at that time, the period of thirty days fixed as sufficient for advising the holder of a policy of the due date of his premium and affording him opportunity of making payment of the same at the home office in New York City, would render the statute effectual for the purpose for which it was designed, if limited to the state of New York, but totally ineffectual, for practical purposes, if extended to all other parts of the United States. It will not be presumed that the legislature recognizing the evil to be remedied, would stop short of an ample relief.

THE STATUTE OF NEW YORK DOES NOT ENTER INTO THE CONTRACT OF INSURANCE, NOR INTO THE CHARTER OF AN INSURANCE COMPANY CREATED UNDER THE LAWS OF THAT STATE.

It is manifest the contract of insurance is complete without reference to this statute. The statute left the parties free to make such contract as they saw fit. No limitation is placed upon their right of contract. It is not until a breach has occurred in the non-payment of premium that the statute be-

comes applicable. It is against the consequences of a breach of the contract that it purports to afford relief. The legislature is at liberty to repeal such statutes without disturbing vested rights. If enacted, they come by way of grace; if repealed, they leave the parties standing upon their contracts as they have seen fit to enter into them.

In *Rosenplanter v. Provident Savings Life Assur. Soc. of New York*, 91 Fed., 728, Hammond, J., speaking of this statute and others of the same nature, says:

"They are not statutes of contract, but remedial statutes; and as to these the rule is that they are not a part of the obligation of the contract. It is not because of the effect of either of these statutes that we have under consideration that the plaintiff or the beneficiary has not incurred a forfeiture strictly according to the terms of the contract, but only that the legislature of New York, having authority over contracts made within the state of New York, has relieved her against a forfeiture so far as the statutes apply, but no further. One who grants a bounty may withdraw it; and it is a mistake to suppose that the right to it becomes perpetual because it has once been granted, where the nature of the gift is such that it must recur from time to time."

In affirming the case of *Rosenplanter v. The Provident Savings Life Assurance Society of New York* (96 Fed., —), the Circuit Court of Appeals meets the question as follows:

"But the very zealous and learned counsel for the beneficiary have very strongly urged that as this contract was made while the act of 1877 was in force, the provisions of that act became so incorporated into the contract as to become a part of the contract itself, and that the provisions of the act of 1877, prohibiting a forfeiture of the interest of the insured in the policy without a notice according to the terms and conditions of the statute, became as much a term and stipulation of the policy as if inserted therein by the parties themselves. Upon this assumption, they insist, that the act of 1877 could not be altered, or amended, or repealed, so as to subject the contract to forfeiture without

the statutory notice, as such repeal or amendment would impair the obligation of the contract.

"To this we cannot agree. The contract which the parties themselves made was one for an insurance for a single year, with the privilege of renewal for succeeding years upon condition of the payment of an additional premium upon the day named in the policy. Failure to renew it according to the condition of the contract put an end to the policy without more ado. So with respect to the payment of the second half of the yearly premium; if not paid when due, the contract was thereby terminated. The act of 1877 interposed and for the benefit of the insured provided, that the stipulations of the contract in respect to the termination of the policy should not be enforced unless notice of a certain character had previously been given by the insurer. * * *

"Laws repealing laws which prevent the operation of contracts otherwise within the competency of the parties, and permit their enforcement according to their terms, have never been regarded as laws impairing the obligation of contracts or as an impairment of vested rights. *Conn. Life Ins. Co. v. Cushman*, 108 U. S., 51-65; *Ewell v. Daggs*, 108 U. S., 143; *Gross v. United States Mortgage Co.*, 108 U. S., 477; *Butler v. United States B. & L. Ass.*, 97 Tenn., 679; *Curtis v. Leavitt*, 15 N. Y., 15, 85; *Lewis v. McElrain*, 16 Ohio, 347; *Trustees v. McCaughy*, 2 Ohio St., 152; Cooley, Const. Lim., sides pages 293-378.

"Judge Hammond, who heard this case below, very admirably answered the argument that the act of 1877 so entered into the contract as to make its repeal an impairment of its obligations, by saying:

" 'If the provisions of the statute as to notice had been written in the policy as agreements of the parties, that would have been their contract, and of course the law could not make another contract for them. Wherefore, it would be enforced by the courts as the agreement of the parties; but the statute did not undertake to make a contract of insurance for the parties. It

was only a statutory regulation for the government of insurance companies, compelling them to give notice as required by the act of the non-payment of premiums before they would be allowed to declare a policy forfeited according to its stipulations. It was a regulation that the legislature had a right to make. It was a beneficent regulation for the relief against a forfeiture created under the contract which it was entirely competent for the legislature to withdraw, alter or amend, as to it might seem best.

"'Surely, if we turn the principle contended for the other way, its operation would be denied by the plaintiff and her counsel. That is to say, if an insurance company should contend that at the time of the passage of the act it had already issued a policy defining the terms of forfeiture, and that it was not within the power of the legislature to impair the obligation of that contract by importing into it a different stipulation or provision as to the conditions of forfeiture, the beneficiaries would deny that such legislation unconstitutionally impaired the obligation; but if the legislature has the power to import into an existing contract such a regulation for giving notice without impairing the obligation of the contract as to the insurance company, it has the right to take it away by repeal, without impairing the obligation as to the beneficiary.'"

In the case of *Ewell v. Daggs,* 108 U. S., 143, it was held that the repeal of the statute of Texas which made contracts void for usury, acted retrospectively and took away the right of the defendant to make the defense of usury, but that such a repeal was not legislation impairing the obligation of contracts. Mr. Justice Matthews uses this pertinent language:

"The effect of the usury statute of Texas was to enable the party sued to resist a recovery against him of the interest which he had contracted to pay, and it was, in its nature, a penal statute inflicting upon the lender a loss and forfeiture to that extent. Such has been the general, if not uniform, construction placed upon such statutes. And it has been quite as generally

decided that the repeal of such laws, without a saving clause, operated retrospectively, so as to cut off the defense for the future, even in actions upon contracts previously made. And such laws, operating with that effect, have been upheld, as against all objections on the ground that they deprived parties of vested rights, or impaired the obligation of contracts. * * *

"And these decisions rest upon solid ground. Independent of the nature of the forfeiture as a penalty, which is taken away by a repeal of the act, the more general and deeper principle on which they are to be supported is, that the right of a defendant to avoid his contract is given to him by statute, for purposes of its own, and not because it affects the merits of his obligation; and that whatever the statute gives, under such circumstances, as long as it remains *in fieri*, and not realized by having passed into a completed transaction, may, by a subsequent statute, be taken away. It is a privilege that belongs to the remedy, and forms no element in the rights that inhere in the contract." (pp. 150-151.)

In *Gross v. U. S. Mortgage Co.*, 108 U. S., 477, construing a statute which gave validity to a contract otherwise invalid, this Court, through Mr. Justice Harlan, says:

"When the legislative department removed the inhibition imposed, as well by statute as by the public policy of the state, upon the execution of a contract like this, it cannot be said that such legislation, although retrospective in its operation, impaired the obligation of the contract. It rather enables the parties to enforce the contract which they intended to make. It is, in effect, a legislative declaration that the mortgagor shall not, in a suit to enforce the lien given by the mortgage, shield himself behind any statutory prohibition or public policy which prevented the mortgagee, at the date of the mortgage, from taking the title which was intended to be passed as security for the mortgage debt."

It is thus seen the statute of New York does not enter either into the contract of insurance or the charter of the insurance

company. The statute being one of remedy and of public policy, cannot extend beyond the borders of the state of New York. If it enters into a contract made outside of New York or comes by way of remedy for its breach, it does so as a stipulation of the parties, and not by the authority of the legislature. By the terms of this policy it did not become a contract until it was delivered at Butte, Montana, where the first annual premium was paid. This marks the radical difference between business done or a contract made by the insurance company in the state of New York and outside of that state. In the one case the policy of the law which is omnipotent, enters into the contract and controls the parties to it, while in the other, neither the statute nor its policy have a place, and therefore, as a statute and as a policy, it cannot enter into the contract or transaction.

IN VIEW OF THE UNCERTAINTY OF THE DECISIONS AS TO THE LAW CONTROLLING THE PERFORMANCE OF CONTRACTS LIKE THE ONE IN CONTROVERSY, THE OPINION OF THIS COURT WILL BE OF PUBLIC IMPORTANCE AND TEND TO SECURE UNIFORMITY OF DECISION.

The court adopted the view that the policy was a New York contract and its provisions were dominated and controlled by the statutes of that state relating to insurance companies, and that compliance with such statutes was indispensable to a forfeiture of the policy for non-payment of the premiums.

(Record, p. 52.)

It is true the application recites that it was made subject to the charter of the company and the laws of New York, and that payments are to be made at the home office of the insurance company. But it stands admitted that the insured was from the time of making his application and the delivery of the policy, a citizen and resident of Montana; that his written application for insurance was made and delivered to the company's

agent at Butte and by him transmitted to the New York office; that the policy of insurance was transmitted to the agent at Butte, and upon the payment there of the first annual premium was delivered to Cohen; that the contract expressly provided that it should not take effect until "the first premium shall have been paid and the policy shall have been delivered."

The case in each of the elements going to determine where the contract was executed and by what law it should be governed, is substantially like that of *Equitable Life Assurance Society v. Clements, 140 U. S., 226*, where Justice Gray summarized the case substantially as follows:

The assured was a resident of Missouri and the application was signed there; the policy was executed at the company's office in New York and provided that the contract was set forth in the application and policy taken together. The application declares the contract shall not take effect until the first premium has actually been paid during the life of the assured. The two premiums were paid in Missouri. The answer admits the payment of the premiums and the petition alleges the policy was delivered in Missouri to the assured. The opinion then proceeds:

"Upon this record, the conclusion is inevitable that the policy never became a completed contract, binding either party to it, until the delivery of the policy and the payment of the first premium in Missouri; and consequently that the policy is a Missouri contract and governed by the laws of Missouri." *(P. 232.)*

Unrestricted freedom of contract is conspicuously made manifest in this policy; whatever else may be doubtful, there is no uncertainty left in respect to the intention of the parties in this respect. They agree that the notice contained in the policy is given and accepted by the delivery and acceptance of the policy

and expressly waive any other notice, and declare the contract shall become void by non-payment of premiums.

In the case of *Liverpool and Great Western Steam Co. v. Phenix Ins. Co., 129 U. S., 397*, the court lays down the following rule:

"This review of the principal cases demonstrates that according to the great preponderance, if not the uniform concurrence, of authority, the general rule, that the nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view, requires a contract of affreightment, made in one country between citizens or residents thereof, and the performance of which begins there, to be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country." *(P. 458.)*

The *Brantford City, 29 Fed., 373*, is forcibly in point. A contract was made at Boston with local agents of the British Steamship Company, by the terms of which libelants were to ship cattle on a British steamer from Boston, and deliver them at Deptford, England, for a freightage of eighty-five shillings sterling per head. The court says:

"2. The defendants contend, however, that, inasmuch as the cargo was taken on board of a British ship, and as the bill of lading was signed by a British master, for transportation to England, the stipulations of the bill of lading exempting the ship from liability for negligence and from loss by death, however occasioned, afford a complete defense; because such stipulations are valid by the laws of England.* * * The question presented is a very important one. All the steamship lines, whether domestic or foreign, that sail from this port, insert in their bills of lading substantially the same conditions. Considering the number and the magnitude of the shipments by

these lines, and the very diverse views found in the text-books and decisions upon this branch of the conflict of laws, I have deferred a decision of the cause until able to give the questions involved something, at least, of the consideration their importance demands. The conclusion to which I have come is that our law must prevail, whether the question be viewed as a question of responsibility for a tort or for the construction and validity of the exceptions in the bill of lading, in a conflict of laws; or as a question of evidence and procedure; or as a question of comity as related to our national policy."

Cox v. United States, 6 Pet., 83, 172, 203.
Scudder v. Union Nat'l Bank, 91 U. S., 406.
The Pennsylvania Co. v. Wm. Fairchild, 69 Ill., 260.
McDaniel v. The Chicago & N. W. Ry. Co., 24 Iowa, 412.

CAN RECOVERY BE HAD ON A POLICY OF INSURANCE WITHOUT FIRST PAYING OR OFFERING TO PAY DELINQUENT AND UNPAID PREMIUMS?

The opinion of a majority of the court in the case of *Baxter v. Brooklyn Life Ins. Co., 119 N. Y. Rep., 450,* and cases adopting it, was followed as authority for a recovery of the insurance without first making payment or tender of delinquent premiums. The decision in that case was by a divided bench of four judges in favor and three in opposition. Andrews, J., with whom Earle and Gray, JJ., concurred, insisted that the payment or proper tender of delinquent premiums was a necessary condition precedent. From his opinion we quote as follows:

"But it is a condition precedent to the maintenance of such action that the plaintiff must, before suit brought, have paid or tendered the premium unpaid. The plaintiff, under the statute of 1877, is not required as before to show that it was paid or tendered on the day fixed in the policy, but he must aver and prove that payment was made at some time before the action was commenced, or else no right of action has accrued. This is

in accordance with the well-settled rule that in mutual promises the plaintiff seeking to charge the defendant, must aver and prove performance on his part of that which was the consideration of the defendant's promise, and this as well where the promise of the plaintiff was to be performed before the day fixed for performance by the defendant, as where the performance of respective promises were concurrent and independent."

Loud v. Land Co., 153 U. S., 564.
Phillips Co. v. Seymour, 91 U. S., 646 (650).

There might be some more plausible ground for violating this rule of law and practice in states where the distinctions between law and equity are abolished than in the federal courts wherein such distinctions are definitely preserved.

This court has said concerning the nature of such a contract:

"It is an entire contract of life insurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. * * * Each installment (premium) is, in fact, part consideration of the entire insurance for life. It is the same thing where annual premiums are spread over the whole life. * * * The whole premiums are balanced against the whole insurance."

Ins. Co. v. Statham, 93 U. S., 24 (30).
See also Kellner v. Ins. Co., 43 Fed., 623 (627).

Notwithstanding the New York statute, therefore, and even if it be held applicable to this contract, there became due from Mr. Cohen to the company June 11th, 1892, and each succeeding year, including 1897, the premium of $98.61, and such premiums, except one-half of said premium falling due June 11th, 1892, which was paid on that date, remained due at the beginning of this action.

Thompson v. Ins. Co., 104 U. S., 252 (260).
Insurance Co. v. Unsell, 144 U. S., 439 (447).

In the former of these cases, the court says:

"A fatal objection to the entire case set up by the plaintiff is, that payment of the premium note in question has never been made or tendered at any time. There might possibly be more plausibility in the plea of former indulgence and days of grace allowed, if payment had been tendered within the limited period of such indulgence. But this has never been done. The plaintiff has heretofore failed to make a case for obviating and superseding the forfeiture of the policy, even if the circumstance relied on had been sufficiently favorable to lay the ground for it. A valid excuse for not paying promptly on the particular day, is a different thing from an excuse for not paying at all."

In the latter case, the beneficiary relied upon a waiver as excusing payment of the premium at the time the same was due and as defeating the right of the company's forfeiture; but there was evidence in this case that payment of the premium had been tendered subsequent to the due date. In discussing this question, Justice Harlan, at page 447, says:

"If the plaintiff had sued on the policies or certificates *without having paid or tendered the amount due to the company*, the non-payment of which, at the time stipulated, was relied on to prove that the policies had become forfeited, that *fact would have been fatal to a right to recover, in any view of the case.*"

DOES THE GENERAL STATUTE OF NEW YORK RELATING TO BUSINESS OF LIFE INSURANCE COMPANIES AFFECT THE MUTUAL LIFE INSURANCE COMPANY CHARTERED UNDER A SPECIAL STATUTE OF THAT STATE?

Now the question to be solved here, is whether the special act of the legislature of the state of New York of April 12th, 1842, entitled "An Act to incorporate The Mutual Life Insurance Company of New York," is affected by the general statute relating to insurance corporations transacting business in the

state of New York. (See Petition, p. 2.) This special act of the legislature is the charter of the corporation; it is the fundamental law which governs it, except so far as the same has been altered by statutes properly passed. It is true that Section 18 of this act provides that the legislature may at any time alter or repeal this act; but it never had altered or repealed it, except in 1851, when it passed an amendment to the act, which is of no importance here, and afterwards, in April, 1862 when it passed another amendment to the act which is of no importance in this case. No other act has ever been passed by the legislature of the state of New York amending the special act of the legislature to incorporate The Mutual Life Insurance Company of New York. Certainly the general statute cited in the petition does not alter the charter of this company; certainly it does not decrease its power; certainly it cannot affect any of its rights under the contract which it made with the state. It is in violation of statutory construction to hold that a special act of the legislature is altered, amended or repealed by general legislation, unless particular reference is made to the special act, or it is otherwise made clearly manifest that the special legislation was intended to be embraced within the general act. It may be subjected, indeed, to the general provisions of law under the police power which the state has a right to enact.

THE PENAL CONSEQUENCES RESULTING FROM OBEYING THE NEW YORK STATUTE WILL NOT BE ENFORCED IN ANOTHER STATE.

This company is required by the statute to send a notice of the coming due of each installment of premium to the policy-holder or his assignee, and if the court finds it has failed to do so in this case, what is the consequence? It must pay the penalty. Is the state of Washington going to enforce the penal laws of the state of New York, and collect from its disobedient cor-

porations the sums which they have been muleted in, for doing or not doing something which the laws of New York require to be done or to be left undone?

The authorities holding that states will not enforce the penal laws of other states within their jurisdiction are too numerous to cite. We cite only those which hold that the United States courts sitting in other states enforce only the laws of the states in which they are sitting, and will not enforce the penal laws of other states.

The Antelope, 10 Wheaton, 66.
Flash v. Conn, 109 U. S., 371.
Lyman v. B. & A. R. R. Co., 70 Fed. R., 409.
Huntington v. Attrill, 146 U. S., 657.
Texas v. Day Co., 41 Fed. R., 228.
Wisconsin v. Pelican Co., 127 U. S., 265.

We, therefore, argue that the general statute of New York respecting notice did not become a part of the charter of the insurance company and cleave to it going with it into other states and was not intended to affect either its being or its transactions outside New York.

American Bible Society v. Marhsall, 15 Ohio St., 543.

MEANING OF THE STATUTE OF NEW YORK.—WAS IT THE INTENTION OF THE LEGISLATURE TO PROTECT THE AMOUNT OF THE POLICY FROM FORFEITURE, IF NOTICE OF UNPAID PREMIUM WAS NOT GIVEN, OR ONLY SUCH PORTION THEREOF AS PREMIUMS ALREADY PAID HAD PURCHASED?

If the New York statute applies to this case and the penalties of failing to mail the notice prescribed by that statute are visited upon the corporation, what is the punishment? A mutual life insurance company is a mutual association of which every policy owner is a member, the corporation being but the agent or

trustee of this association of individuals. By taking a life insurance policy and paying the annual premium he enters into partnership. One of the members of the association was entitled to have a certain statutory notice mailed to him by some agent of the corporation stating the amount of the premium or interest due on the policy, the place where the interest or premium is to be paid, and the person to whom the same is payable, the notice to state that unless the premium or interest then due shall be paid to the company or duly appointed agent within thirty days after the mailing of the notice the policy will become forfeited and void. This notice is not deposited in the mail, but the member is otherwise fully possessed of all the information such notice can impart and so confesses. He fails to pay his premium, not for want of notice, but for want of money, and from that time forward suffers his premiums to go unpaid. Shall he, under such circumstances, make the want of formal notice, though possessed of actual notice, his excuse for taking advantage of his own failure to mulct his associates in damages to the amount of his failure? Is such the intent of the legislature?

To construe a statute properly there should be an appreciation of the exact quality of the evil against which it was aimed, its extent, and its mischief. If the statute is a penal one, that is, if it forbids the doing of some act which otherwise it would be lawful to do, then it has to be strictly construed. If it is a remedial statute, then it is to be construed so as to bring about the remedy which the statute was intended to procure. But, above all things, the statute must be construed in a spirit of justice. It must not be extended beyond the remedy which is sought to be enforced, and particularly it is not to be extended so as to do injustice, or inconvenience, or absurdity. We are not to suppose that the legislature, in attempting to remedy a

wrong, itself committed a greater wrong, or that in its attempt to remedy a hardship it has committed injustice.

Now let us look at this statute in the light of these principles. Contracts of insurance are made for the purpose of securing a principal sum to be paid on the death of the life insured, and, in order to secure this principal sum to be so paid, annual, or semi-annual, or quarterly installments of premium are paid to the company. It is absolutely necessary, in order to conduct the business successfully, that such premiums should be so paid, and that they should be so paid on the day they are due, because life insurance takes into account not only the average human life, but compound interest upon the installments which are paid. To leave out either element would destroy the scientific theory upon which life insurance is based. The contract is not for a fraction of a year, or from one installment period to another; although there is that sort of insurance, called "term insurance," and this statute expressly excludes that sort of insurance from its provisions. But the insurance for life is the insurance which we are now to deal with; and the policy before you in this case, which is the contract upon which the adjudication of this case is to be made, shows exactly what was to be done by both parties to the agreement. The contract is in two parts. One is a proposition in writing (the application) made in Butte, in the state of Montana, immediately prior to the 10th day of June, 1885, signed by Alexander Cohen, and addressed to The Mutual Life Insurance Company of New York. The statements made in that application are offered as *an* inducement to the company to grant the application for insurance; and the policy, when issued, recites that this application is the consideration for granting the policy.

The policy contains the following provision:

"If this policy shall become void, all payments previously made upon it shall be forfeited to the company."

Now, here is the forfeiture which the statute refers to, this is the forfeiture which it is aimed against, and this is the forfeiture which the statute forbids the companies to enforce. What is it? It is not the right to make a contract with the company, or to continue a contract already in existence. The statute prevents the forfeiture. Of what? Why, of the premiums which have heretofore been paid on the policy, and of nothing more. There is nothing more to forfeit. To give such a construction to this statute as that, not only is the forfeiture waived, which in this case amounted to seven years' premiums, but that an effect shall be given to the policy the same as if the premiums were regularly paid on each succeeding installment day provided in the policy, would be to give it a construction contrary to reason and contrary to justice. It would be a violation of the rights of the insurance company which is unnecessary in order to accomplish the non-forfeiture of the premiums. It is not necessary to go to this length in order to sustain the statute. The statute was intended to provide that notice should be given of the recurrence of the payments, so that the policy-holder should not be taken by surprise, or affected by forgetfulness, oversight or sickness, and thus prevented from paying his premium on the very day it was due. It was an extension by the statute of an equitable interposition to prevent the forfeiture. This cannot be construed to bring about a greater forfeiture than it was made to prevent. It cannot be construed, without violating reason and justice, to mean that the policy-holder was forever discharged from his obligation to pay the premium because of the failure of this notice. There is something to forfeit. There is an accretion in the hands of the company of the surplus paid on each succeeding year the policy has been in force, which is

forfeited unless the premium is paid. And to make sure the payment of which, the clause of forfeiture was inserted in the policy. *It is to prevent that forfeiture that the statute was passed; and in this case seven years' premiums have been paid. To do equity between the parties, you must deduct from those seven years' premiums the cost of carrying the insurance for seven years as if it were a term policy, and then the amount of surplus which remains in the hands of the company, and which by the contract it has power to forfeit but for the statute, would be the amount of the proper recovery in this case.* (See Record, p. 4.)

This is rendered clear by the decision of the Supreme Court of the United States in the case of the New York Life Insurance Company v. Statham, 93 U. S., 24. The policy in this case had become, by its terms, void, and the reserve, or surplus, in the hands of the company had been forfeited to the company in consequence of the condition of the country, being in a state of war with the southern states.

Says the court in that case:

"Non-payment at the day involves absolute forfeiture, if such be the terms of the contract."

Then the court goes on to show that what there is in the hands of the company to be forfeited is surplus premiums over the amount which was necessary to carry the expired risk, and which is called in insurance circles the "reserve." That reserve is equitably the property of the insured; and when he is forced to go out of the company by the unforseen exigencies of war, he is entitled to take that amount with him.

That is all that could have been forfeited under any circumstances by the contract. Now the statute comes in and says that the company shall not forfeit that, unless it gives notice.

This is a very different thing from saying that unless it gives notice the contract shall be continued to the end of the life of the party insured, and if at any time hereafter he shall die the whole amount of the insurance shall be paid over after deducting the back premiums. If he lived long enough to make those premiums equal to the amount of the principal sum, the company would never hear of him. If he died within a few years, as Cohen did in this case, then the company would hear of him as it has heard in this case, with a claim for the amount insured, without any attempt whatever to pay the premiums which are confessedly unpaid and in arrears. No legislature could ever have meant such injustice. There must be some limit to the time of rehabilitation. To prevent a forfeiture is not to decree a continuance of the contract all on one side, with no payments on the other. There is no language in the statute which will bear the construction that it was intended to apply to more than one failure to pay premium.

This statute is, as we have shown elsewhere, highly penal as regards the company. The penalty cannot be exacted more than once while the first overdue premium remains unpaid. The statute was exhausted upon the failure to give the notice in June, 1893, and until the assured paid that premium he could not claim the benefit of the statute for the failure to give notice of the payment due a year after in 1894. This would be construing the statute as if it contained the language "that the company is forbidden to forfeit for each and every premium unpaid for which proper notice had not been given."

The penalty is inflicted upon the company solely to prevent the forfeiture by inadvertence, mistake or forgetfulness. It was not intended to release the insured from all future liability. There can be no continuous credit given for the premium on the ground of a continuous failure to give notice.

Fisher v. N. Y. C. & H. R. R. Co., 46 N. Y., 644.

In this case the legislature had forbidden railroad companies to charge more than two cents a mile for passengers, and inflicted a penalty of fifty dollars for disobeying the law. A passenger rode again and again upon the railroad and then sued for the accumulation of penalties, but the Court of Appeals held that only one penalty could be recovered. If, after suit was brought for the first penalty, the company did not avail itself of the notice and cease its illegal action, a suit might be brought for another, but in the quaint language of Judge Grover, who wrote the opinion, people should not be permitted to keep a "book account" of penalties.

In this case, had we been informed of the failure to give notice, we could promptly have corrected the omission, but then Mr. Cohen would have had to pay the premium within thirty days, which is just what he wanted to avoid.

A FATAL DEPARTURE FROM LAW TO LAW WAS MADE IN RENDERING THE JUDGMENT SOUGHT TO BE REVIEWED, BECAUSE THERE ARE NO PLEADINGS FOR SUCH A JUDGMENT TO BE BASED UPON.

The statute of New York was not pleaded nor the failure of plaintiff in error to comply with its provisions, nor was it even referred to in the complaint. Where the relief of the statute is relied upon as an excuse for non-performance, the statute itself becomes a necessary part of the pleading, as well as the non-compliance of the insurance company with its requirements, which relieves against the breach of conditions on the part of the insured.

Rosenplanter v. Provident Sav. Life Assur. Soc., 91 Fed., 728.

It is not a question as to whether the court takes judicial notice of the statutes of New York, but rather one of departure

from law to law in the pleading. Whether a party who pleads a specific contract and performance on his part of its conditions as his right to recover shall be permitted after performance has been controverted, to confess his non-compliance and shift his right of recovery to an unpleaded statute of a foreign state and assert non-compliance with its provisions on the part of defendant, and adopt the defendant's non-compliance with the unpleaded statute as his own excuse for non-compliance with the conditions of the contract alleged in his complaint. The right of action alleged and abandoned is the act of the party; that not alleged but relied upon is the act of the legislature of New York. With performance of the conditions alleged the right of action is perfect regardless of the New York statute. Without performance of the conditions alleged, there is no right of action whatever, unless it can be established through the statute of New York. If the statute of New York, instead of performance of the conditions of the contract by the defendant in error, affords the ground of recovery, then pleading of the statute is indispensable.

Union Pacific Railway v. Wyler, 158 U. S., 285.

In the case cited, a party sued the railway company for a personal injury, basing his right to recover upon the general law of master and servant. After the cause had been transferred to the Federal Court and remained in litigation for a number of years, the plaintiff amended his complaint so as to bring himself under the fellow servant act of the state of Kansas. Upon amendment being made, the defendant interposed the statute of limitations as to an original suit begun at the date of amendment. Mr. Justice White in delivering the opinion of the court, adopted the following definitions and illustrations of departure:

"Coke upon Littleton, 304 *a*, says: 'When a man in his

former plea pleadeth an estate made by the common law, in the second plea regularly he shall not make it good by an act of Parliament. So when in his former plea he intituleth himself generally by the common law, in his second plea he shall not enable himselfe by a custome, but should have pleaded it first.'

"Comyn's Digest, 'Pleader,' (F. 8,) states the same rule, and gives the following illustrations of departure:

" 'In debt on bond by sheriff against his bailiff to pay him 20d. for every defendant's name in every warrant in mesne process, defendant pleads he had paid it, plaintiff replies that he had not paid it for A; defendant rejoins Stat. 23 H. 6, and 3 G. it is a departure; for pleading he has had and rejoining he ought not to pay; and for pleading common law plea, and rejoining a statute. *Balantine v. Irwin, M. 4 G. 2, C. B. Fort. 368.*

" 'So, if a man avows, for that A being seized in fee granted to him a rent, and the defendant pleads, nothing in the tenements at the time of the grant, and the plaintiff rejoins that A. was *cestuy que use* in fee, which use is now executed by the statute of uses; this is a departure.' *Pl. Com. 105 b.*

"Chitty on Pleading, *1, pp. 674, 675,* states the principle as follows: 'A departure may be either in the substance of the action or defence, or the law on which it is founded; as if a declaration be founded on the common law, and the replication attempt to maintain it by a special custom, or act of Parliament.'

"Stephen on Pleading, *pp. 412, 413,* thus elucidates the point: 'These, it will be observed, are cases in which the party deserts the ground, in point of fact, that he had first taken. But it is also (a) departure, if he puts the same facts on a new ground in point of law; as if he relies on the effect of the common law, in his declarations, and on a custom in his replication; or on the effect of the common law in his plea, and a statute in his rejoinder.'

"Gould on Pleadings, *pp. 423, 424,* ays:

"'When the matter, first alleged as the ground of action or defence, is pleaded as at common law, any subsequent pleading by the same party, supporting it by a particular custom, is a departure.' *(pp. 290-291.)*

And in applying the foregoing rules, says:

"A suit based upon a cause of action alleged to result from the general law of master and servant was not a suit to enforce an exceptional right given by the law of Kansas. If the charge of incompetency in the first petition was not *per se* a charge of negligence on the part of the fellow-servant, then the averment of negligence apart from incompetency was a departure from fact to fact, and, therefore, a new cause of action. Be this as it may, as the first petition proceeded under the general law of master and servant, and the second petition asserted a right to recover in derogation of that law, in consequence of the Kansas statute, it was a departure from law to law. This conclusion is strengthened by the fact that in most of the states the laws of other states are treated as foreign laws, which must be pleaded and proven. Sedgwick on Statutory and Constitutional Law, *363; Hempstead v. Reed, 6 Connecticut, 480; Swank v. Hufnagle, 111 Indiana, 453; Root v. Merriweather, 8 Bush, 397.* Although this rule is not invariably adhered to, it is part of the law as administered in the state of Missouri.

Babcock v. Babcock, 46 Missouri, 243.

"The suit here was brought in a Missouri court, and was necessarily controlled by the law of that state.

"It is argued, however, that, as all the facts necessary to recovery were averred in the original petition, the subsequent amendment set out no new cause of action in alleging the Kansas statute. If the argument were sound, it would only tend to support the proposition that there was no departure or new cause of action from fact to fact, and would not in the least meet the difficulty caused by the departure from law to law. Even though it be conceded that all the facts necessary to give a right to recover were contained in the original petition, as this

predicated the assertion of that right on the general law of master and servant, and not upon the exceptional rule established by the Kansas statute, it was a departure from law to law. The most common, if not the invariable, test of departure in law, as settled by the authorities referred to, is a change from the assertion of a cause of action under the common or general law to a reliance upon a statute giving a particular or exceptional right. It is true that the Federal courts take judicial notice of the laws of the several states. *Priestman v. United States, 4 Dall. 28; Owings v. Hull, 9 Pet. 607; Corington Drawbridge Co. v. Shepherd, 20 How. 227; Cheever v. Wilson, 9 Wall. 108; Junction Railroad v. Bank of Ashland, 12 Wall. 226.* This rule, however, does not affect the present suit, which was commenced in the court of Missouri. Moreover, the departure which arises from relying, first, upon the general or common law, and, in the second instance, on an exceptional statute, is a question of pleading, and is not controlled by the law in regard to judicial notice of statutes which is a matter of evidence. The very origin of the rule in regard to departure from law to law makes this obvious. The English courts, from which our doctrine upon this subject is derived, necessarily take judicial notice of acts of Parliament, yet there a departure is made and a new cause of action is asserted when a party who has at first relied upon the common law afterwards rests his claim to recovery upon a statute." *(pp. 295-296.)*

The preserved distinction between legal and equitable remedies in the Federal courts prevents such a departure as was made in this case. It is not contended one is entitled to insurance without payment at some time and in some form, of the premiums with which the insurance is purchased; it is not claimed that failure to give the statutory notice operates as a payment. How then, on a complaint that avers performance of all conditions, that is, payment of all premiums, is the common law court to enter into the field of accounting and ascertain what premiums have been paid and what have not, compute interest on the unpaid premiums according to the law of the

forum of the state of New York, and render its judgment or decree for whatever equitable balance may be found due? Suppose such a practice adopted where a policy had been issued to a middle-aged person immediately upon the enactment of the statute of 1876, and but a single annual premium paid, and death occurred about this time and an action should be brought upon that policy in the form adopted in this case. The aggregate of unpaid premiums and their accumulated interest would constitute an equitable setoff exceeding the amount of the policy. If, without pleadings framed for the purpose, the plaintiff is entitled to recover, why not the insurance company, the balance being in its favor?

IN THIS CASE THERE WAS NOT UNDER ANY ASPECT OF THE MATTER ANY OBLIGATION TO SEND NOTICE IN 1897, AND RECOVERY IS SHUT OUT BY THE AMENDMENT OF 1897 TO SECTION 92 OF CHAPTER 690 OF THE LAWS OF NEW YORK OF 1892.

(*a.*) Whether the Act of 1897 be regarded as a new law, or simply declaratory of what the pre-existing law was, it is clear that subsequent to the passage of that act, that is subsequent to April 8th, 1897, no notice had to be sent to Cohen as he was not a resident of the State of New York.

This act provides that the notice shall be mailed to the person whose life is insured, or the assignee of the policy, if notice of the assignment has been given to the corporation, "at his or her last known post-office address in this State," that is, New York.

This act took effect April 8th, 1897, and Cohen was alive on June 11th, 1897, when a premium became due and was not paid.

Under the doctrine of the Rosenplaenter case, herein-

after cited, whether the law of 1897 was a new law or merely declaratory of the existing law, no notice was required to be sent to Cohen, and as he did not pay his premium on that day, the policy was lapsed and forfeited for failure to pay that premium, entirely irrespective of what had occurred previously.

On the theory of the plaintiff, if Cohen was sent no notice on December 10th, 1892, and did not pay his premium at that time, his policy was not void and forfeited; but on this theory the failure to send a notice could not possibly carry the policy any further than the payment of a premium would have carried it; so that on the theory of the plaintiff by successive failures to send notices, in 1893, 1894, 1895 and 1896, his policy was carried in force up to June 10th, 1897, but at that time, the defendant was obliged to send no notice, and that if he failed to pay his premium, then the policy was forfeited and lapsed, even on the theory of the plaintiff.

In connection with this point (*a*) see discussion of effect of statute under (*b*).

(*b.*) Under the Act of 1897, if there is a controversy as to whether a premium is forfeited or not, such an action must be begun to determine such controversy within one year from the date of the default in the payment of the premium. In this case the final default was on June 10th, 1897, and no suit was begun until November 9th, 1898, some seventeen months afterwards. The final default took place June, 1897. After the final default Cohen, until his death, September 21st, 1897, and his executors thereafter, until June 10th, 1898, had the right to litigate the propriety of such default, but not having done so their right to do so is barred. The reason upon which the statute is based clearly is that policy holders must pay their pre-

miums on their due date, or must before a second premium becomes due, litigate any question of forfeiture arising out of the non-payment of the previous premium.

The policy was issued June 10th, 1885, when the first annual premium was paid, but no part of any premiums subsequent to June 11th, 1892, has ever been paid or tendered. The insured, Alexander Cohen, died September 21st, 1897. Action was commenced November 9, 1898. (Record, p. 10.) It is thus seen that no premium had been paid for five years previous to the death of the insured, or for more than that time previous to the commencement of this action. It will be borne in mind that the express stipulation of the contract is, that non-payment of the premium when due renders the policy void. If, then, a right of recovery exists, it must be through the statute of New York, and upon the terms prescribed by the statute, and the suit must be brought within the time prescribed by the law which constitutes a part of the statutory right. It is through the grace of the legislature of New York that the right of action upon the forfeited policy is given, if at all, and one who relies upon it must bring himself within the terms of that statute; one of which is the time of taking advantage of the favor it bestows.

The amendment by Chapter 218, Laws of 1897, is as follows:

"No action shall be maintained to recover under a forfeited policy, unless the same is instituted within one year from the day upon which default was made in paying the premium, installment, interest or portion thereof for which it is claimed that forfeiture ensued." (Petition, pp. 3 and 4.)

Though it be held that the policy remained alive for want of the statutory notice, it is none the less true that

default was made in payment of the premiums due in each of the years 1893, 1894, 1895, 1896 and 1897, and has so continued to this date. The legislature of New York, as has been shown, did not touch the contract and its obligations, and did not enter into the charter of the company. This statute would, in case the business was transacted in the state of New York, relieve the insured against the consequences of a violation of his contract. By the express stipulation of the policy it became lapsed and forfeited by the non-payment of the premium when it fell due; but notwithstanding such forfeiture, the insurance company was forbidden to take advantage of it and declare the contract forfeited and lapsed, unless it mailed a certain notice; although the forfeiture had occurred, the company was, in a case where the statute applied, prevented from availing itself of that forfeiture or declaring it, till a proper notice was mailed. The insured did not pay his premium in the company's failure to give the notice. He was only relieved from the consequences of his violated contract. It is none the less, by its own terms, a forfeited policy, though the insurance company is not permitted to declare it such without first mailing the statutory notice. The language of the statute is: "No life insurance corporation doing business in this state shall declare forfeited or lapsed any policy hereafter issued or renewed." (Petition, p. 2). The "forfeited policy" in contemplation of the amendment of April, 1897, is that policy upon which the premium has not been paid according to its terms, and such is the forfeited policy in the sense of the statute amended.

This view of the statute is clearly brought out in *Rosenplanter* vs. *Provident Savings Life Assur. Society* before cited, 96 Fed., p.

"The statute did not provide that the interest of the insured shall not be forfeited upon failure to renew the policy by the payment of the stipulated premium, but that the forfeiture should not be declared or be effective unless the default in the payment of the stipulated premium should occur after a particular notice had been given prior to the stipulated day of payment, or a default should continue after a particular notice and demand for payment had been given. Thus the law stepped in and in effect said: 'You shall not enforce the stipulations into which you have entered in respect to the effect of a default in payment of premiums unless you first comply with this statute by giving the notice herein required.' The subsequent repeal of this statute does not impair the obligation of the contract in respect to premiums which should mature thereafter. The repeal simply permits the contract into which the parties had entered to be enforced according to its own terms and conditions."

If it should be claimed that the policy was issued prior to the amended statute of 1892, and therefore that statute and its amendment of 1897 are not applicable, the objection is met by the fact that it was "renewed" after the enactment of 1892. Without the payment of the annual premium the policy lapses, but by means of such payment it is restored, reinstated, continued, or, in the language of the statute, renewed; such is the interpretation given by the Courts of New York to this word as employed in the statute.

We quote from *Carter* vs. *Brooklyn Life Ins. Co.* (*110 N. Y., 15*), *17 N. E. 396*:

"We are also of the opinion that the payment of each annual premium constituted a renewal of the policy within the meaning of the term "renewed" as used in the act. While it was provided by the policy that it should continue for the term of the natural life of the insured, it was

expressly provided that this was upon the condition that he should pay the annual premiums as they became due by the terms of the policy. A failure to pay such premiums in any year was declared to render the policy null, void and of no effect; but, when paid, it continued, by force of such payment, the policy in existence for the period of another year. This process each year revived or renewed the policy as it approached the period of its agreed termination. It is not according to the popular notion of the meaning of the word "renewal" that it can take place only after the death or expiration of the subject to which it is applied. Thus to renew a note, a lease, or a contract, it is not essential to wait until they have respectively expired; for, after that time, it would be practically impossible to renew them. A new note or lease may be made or contract created, but they would have force and effect from the new creation, and not from the original agreement. To renew, in its proper sense, is to refresh, revive or rehabilitate an expiring or declining subject; but is not appropriate to describe the making of a new contract, or the creation of a new existence. Webst. Dict.; Worcest. Dict. It would be at the option of an insurance company to re-execute a forfeited contract of insurance; and, if the act was held applicable to such a policy alone, it would confer no legal right whatever upon a policy-holder. It was the evident object of the act to make it apply to some existing policies and confer some legal right upon their holders, to avoid a cause of forfeiture; and, if it be held to apply only to lapsed policies, it leaves it entirely optional with the company whether there should be any renewed policies thereafter or not. We are therefore of the opinion that the plaintiff's policy was renewed within the meaning of the act" (p. 399).

And such is the view adopted in *Rosenplanter* vs. *Provident Life Assurance Co.*, cited from above.

"The statute did not provide that the interest of the insured shall not be forfeited upon failure to *renew* the policy by the payment of the stipulated premium."

The right of action being derived through the statute, the time in which it must be brought becomes a part of the statutory right, and unless suit is instituted within such time the right of action is lost.

In distinguishing the rule of limitation with respect to actions given by the common law and those under the statute, in *Finnell* vs. *Southern Kan. Ry. Co.*, *33 Fed.*, *427*, the court says:

"There is also another class of cases in which a cause of action, which does not exist at common law, is created by the laws of a state. Causes of action of that character only exist in the manner and form and for the length of time prescribed by the statutes of the state which created them, and if suit is brought on such causes of action in a foreign jurisdiction the limitation act of the state which created the cause of action may, of course, be pleaded." (p. 428.)

And in *The Harrisburg 119 U. S.*, *199*, this court expresses the rule as follows:

"The statutesc reate a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within twelve months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. No one will pretend that the suit in Pennsylvania, or the indictment in Massachusetts, could be maintained if brought or found after the expiration of the year, and it would seem to be clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations which have been made a part of its existence. It

matters not that no rights of innocent parties have attached during the delay. Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right." (p. 214).

CONCLUSION.

Certiorari is a permissible remedy in a case like the one here presented. We cite as alike in principle the case of *Wabash Western Railway* vs. *Brow*, *164 U. S., 271.* We further call attention to *Saltonstall* vs. *Birtwell*, *164 U. S., 54*, wherein it having been held that the right of an importer to recover excessive duties exacted could not be recovered unless it was shown protest had been made at the time of payment, (though made afterwards and within ten days after the ascertainment and liquidation of duties), and the judgment being affirmed by the Circuit Court of Appeals, this court granted a writ of certiorari, while in the case of "*The Kate*," *164 U. S.. Rep. 458*, certain questions being certified to this court, it caused the whole record to be brought up in order to determine a case involving, as we apprehend, questions of less gravity and less importance, and tending less to establish uniformity of decision than the case at bar.

Telfener vs. *Russ*, *162 U. S. Rep., 170*, was an action by Russ, the holder of a contract to purchase large tracts of land from the State of Texas, against Telfener, to whom he had sold and assigned his contract, upon an alleged breach of the contract of assignment. A writ of certiorari was issued to the United States Circuit Court of Appeals for the Fifth Circuit.

So, also, in *Dashiell* vs. *Grosvenor*, *162 U. S. Rep. 425* a patent infringement case where the decision of the Circuit Court of Appeals is final, as in the other cases cited.

In *The Conqueror*, *166 U. S. 110*, this court issued its writ of certiorari, where the questions were involved as to whether a certain foreign built vessel purchased by a citizen of the United Stares and brought into the waters thereof, was taxable under the tariff laws of the United States, and what was the proper measure of damages suffered by reason of the detention during the time of seizure of such vessel. While In re Chetwood, the court, making the rule absolute in allowing a certiorari where the Circuit Court exceeded its jurisdiction in judging certain parties guilty of contempt in violating the order of the court, made use of the following language (*165 U. S., 443*) :

" By section 14 of the Judiciary Act of September 24, 178 (*1 Stat. 81 c. 20*), carried forward as section 716 of the Revised Statutes, this court and the Circuit and District Courts of the United States were empowered by Congress 'to issue all writs, not specifically provided for by statute, which may be agreeable to to the usages and principles of law' ; and, under this provision, we can undoubtedly issue writs of certiorari in all proper cases. (*Amer. Construction Co. Jacksonville Railway*, *148 U. S.*,) *372*, *380*. And although, as observed in that case, this writ has not been issued as freely by this court as by the Court of Queen's Bench in England, and, prior to the act of March 3, 1891, *c. 517*, *26 Stat. 826*, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice."

Regarding the differences of judicial opinion respecting

a number of the questions raised, and the unsettled rule as to a number of the other questions presented, as well as the importance of a decision affecting a number of cases presented contemporaneously to this court, by petitioner, and still others pending in the Circuit Court of Appeals of the Ninth Circuit, and in the Circuit Court for the District of Washington, in which your petitioner is a party, as well as the importance of a decision affecting numerous outstanding policies of The Mutual Life Insurance Company of New York, and other life insurance companies similarly circumstanced, it is respectfully urged that a writ of certiorari be issued out of this honorable court to bring the record and cause before it, in order that it may decide the entire matter in controversy, as if the case had been brought before the court by a writ of error.

This court in the case of Phinney, Executors *vs.* The Mutual Life Insurance Company of New York, No. 12 on the present calendar of this court, granted a writ of certiorari, and the Phinney case has been passed for special cause, and will be argued in the spring of 1900. The questions involved in this case are to some extent the same class of questions as those in the Phinney case now before this court, and it is respectfully urged that this is an additional reason for the court having before it at the time the Phinney case is argued, other cases involving the same points.

JULIEN T. DAVIES,
EDWARD LYMAN SHORT,
JOHN B. ALLEN,
FREDERIC D. McKENNEY,
ROBERT C. STRUDWICK,
Attorneys for Petitioner.